92-1577

Supreme Court, U.S.
FILED
MAR 17 1993
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. ET AL,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Rrespondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff claiming age discrimination in employment pursuant to 29 U.S.C. §621, *et seq* can survive a motion for summary judgment by the defendant-employer on the issue of "pretext" by introducing affidavits which attest to (1) comments by the employers' upper level management personnel which have age-biased pejorative implications, **coupled with** (2) actual employment practices used by the employer to create the illusion of a full work force thereby avoiding recall of older employees, including the Plaintiffs.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr., and 126 additional individuals who opted-in this case pursuant to 29 U.S.C. §216(b) by filing their written consents[1] were the Plaintiffs-Appellants in Case Number 91-2493 in the United States Court of Appeals for the Fifth Circuit. The Grocers Supply Company, Inc. was the Defendant-Appellee in the court of appeals.

Additionally, in the court below, this case was consolidated with Case Number 91-6043, styled *James E. Hamilton, et al vs. The Grocers Supply Company, Inc.* The Plaintiffs-Appellants in that case are filing a separate Writ of Certiorari[2] and will appropriately identify all of the parties in that suit.

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[1] Because the list of consenting Plaintiffs-Appellants is lengthy, a listing of their names is provided on pages iii and iv.

[2] The *Hamilton* plaintiffs timely filed a petition for rehearing which raised a procedural issue not available to the *Britt* plaintiffs because two cases were tried separately and judgements were entered at different stages in the trial court process. For that reason and because the appellate court's opinion on rehearing made no reference to the *Britt* case, to avoid any jurisdictional questions the *Britt* petition for writ of certiorari is being filed within 90 days of the original decision in the court below.

Ben, Aaron
Ben, Willis
Bertrant, Glendon Felix
Boyd, Carl
Burke Sr., Lenzie
Burley, Sylvester
Campbell, Leslie
Campbell, Major
Chatman, Willie
Clark, Sam
Clayton, L.C.
Clinton, Samuel
Coleman, Richard
Coney, Alvin
Coruthers, Elijah
Craft, Bruce
Craft, Glen H.
Darby, James E.
Davis, Bill
Davis, Jessie C.
Dease, Charles
Deason, Willie
Doggett, Jesse
Douglas, Joe
Drewy, William
Ealey, Walter
Edwards, Donald
Espree, Edward
Finkelstein, Melvyn
Frank, Nelson
Garner, James A.
Garza, Arturo N.
George, Marshall
Gladney, Herbert
Gooden, Elbert L.
Grant, Ernest
Green, Allen
Green, Costell
Greene, Dalfred
Greene, Judge
Greene, Lonnie
Greene, Tom
Greene, Wilfred
Greer, James
Gross, Vernon
Guillory, Larry J.
Gums Jr., Edward
Hailey, Elbert E.
Hall, Turner
Hamilton, Alfred
Hamilton, Alfred
Hargrove, Robert
Harris, Leonard
Harris Jr., Willie
Henry, Joseph
Hernandez, Edward
Hightower, James
Hill, James
Hinton, Carl Edward
Hogan, Gilbert
Holloway Sr., Clarence
Hooks, Raymond
Eugene Hunter
Hunter, Sr., W.L.
Ivory, Clarence
Jackson, Earnest L.
Jackson, Emmerson
Jackson, James
Jackson, Leland
Jackson, Levearl

Jackson, Lorenzo
Jackson, Richard
Jacobs, Talton
Johnson, Wheeler
Jones, Craig
Jones, Floyd
Jones, Marvin
Jones, Roy
King, Cardis L.
Ladet, Hillary
Landry, Curtis
Lane Jr., A.G.
Latin, Robert
Lee, George
Mack, Jerry
Martin, Felix
McAfee Jr., Aubrey
Meekins Sr., Dan
Menifee, Clay
Minor, Jerome D.
Mosley, Robert
Neal, Harold E.
Patterson, Alvin
Patterson, George
Payton, Freelon
Pittman, Bobby
Readus, Willie
Richardson, Curtis
Rideout, Edward
Roach, Jerry
Robins, R.L.
Rogers, Rollie
Royer, Milton
Rusher, Harvey
Rusher, Harvey
Sanders, Robert
Scott, James
Scott, Murray
Scott, Wilson
Searcy, Archie
Seastrunk, Gary Don
Simmons, James
Smith, Leroy
Spencer, Manfred
Thomas, James
Tolivar, Lloyd
Veazie, Kirby
Washington, Howard
Webster, Robert
Wheatfall, K.T.
Whittington, Alfred
Williams, Earnest
Williams Eldrid
Williams, Thomas
Wright, William Barlow
Young, Clarence
Young, Russell

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No. _____

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Supreme Court of the United States

OCTOBER TERM, 1992

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RICHARD L. BRITT AND TIMOTHY JACKSON, JR. *ET AL*,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 15, 1992. (Petition for rehearing in consolidated case denied March 1, 1993).

OPINIONS BELOW

The decision of the district court for the Southern District of Texas is reported at 760 F. Supp. 606 (S.D. Tex. 1991) The decision of the Fifth Circuit Court of Appeals is reported at 978 F.2d 1441 (5th Cir. 1992). The opinion of the court below on the petition for rehearing filed by the *Hamilton* plaintiffs is included here as Appendix A.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on December 15, 1992. Rehearing was denied in the consolidated case on March 1, 1993. This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Age Discrimination and Employment Act, 29 U.S.C. §623(a):

"It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in a way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this act."

Federal Rules of Civil Procedure, Summary Judgment, Rule 56(c) and (e):

(c) Motions and proceedings thereon.

"... the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... ".

(e) Form of affidavits; further testimony; defense required.

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein ... when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial... ."

STATEMENT OF THE CASE

As this case came before the district court for summary judgment consideration, it consisted of a claim asserted by Britt and Jackson, individually and on behalf of others similarly situated, with one hundred twenty-six (126) additional Plaintiffs opting-in pursuant to Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, alleging a claim of age discrimination against Grocers Supply

Company. The Plaintiffs were employees of Grocers Supply Company and members of the Teamsters Local Union No. 968. There had been an approximate thirty year bargaining relationship between Grocers Supply Company and Teamsters Local Union No. 968. The most recent collective bargaining agreement between the company and the teamsters was effective April 7, 1985, was due to have expired October 4, 1986, but was extended by oral agreement until December 21, 1986, at which time the bargaining unit employees, including the Plaintiffs, struck the company. The strike was precipitated by a breakdown in collective bargaining negotiations, and principally, a dispute over the company's proposal to change the basis of employee compensation from an hourly wage to a pay rate based on a productivity standard. The work force consisted principally of employees over the age of forty (40) years old, with the exception of part time or casual employees, and bitterly opposed any production quota system. The company was equally adamant in insisting that it must have a pay rate based on productivity. The strike lasted until April 3, 1987, when the striking employees, including the Plaintiffs, voted to unconditionally offer to return to work. On April 6, 1987, picketing activities ceased. The Plaintiffs immediately attempted to return to work but were refused employment and advised that they had been permanently replaced. The Plaintiffs, however, were to be considered eligible for reinstatement to their former jobs and were to be recalled as soon as positions became available. Incredibly, none of the Plaintiffs' positions became "available" during the following years.

When the strike commenced, Grocers Supply immediately filled all vacancies with new job applicants. Originally, all applicants were informed they were temporary employees pending strike developments. Although the exact time frame was never clear, the company began converting

the replacement employees from temporary to "regular" or "permanent" status sometime early in 1987 before the strike ended. The company maintained this process was completed prior to the time the striking force, including the Plaintiffs, offered to return to work, that thereafter no job vacancies became available, and, therefore, none of the Plaintiffs were allowed to return to work.

After it became apparent that they would not be allowed to return to work, Britt and Jackson exhausted all administrative remedies available within the statutory periods, received "right to sue" letters and, eventually, filed this lawsuit both in their individual capacity and on behalf of others similarly situated. Plaintiffs alleged their "permanent replacement" was a sham or subterfuge and that they were never recalled to their former jobs because of age motivated factors.

The company's original Motion for Summary Judgment was based on two arguments, one purely legal and the other purely factual. The legal argument simply asserted that since the alleged discriminatory conduct occurred in the context of a labor dispute, economic strike and its aftermath, the ADEA claims were preempted by the NLRA. The factual argument originally put forth by Grocers Supply was that a *prima facia* case could not be established because the Plaintiffs were "permanently replaced" after they voluntarily went on strike, and, therefore, were never "discharged."

With regard to the legal issue of preemption, Plaintiffs pointed out to the district court that no authority existed sustaining the proposition that the NLRA preempted the ADEA and that the same conduct could arguably constitute a violation of the NLRA while at the same time support a cause of action asserted under the ADEA.

The Plaintiffs opposed the factual basis of the Defendant's Motion for Summary Judgment by showing (1) that the Defendant failed to discharge its initial burden as a summary judgment movant to demonstrate the absence of a genuine issue of material fact; (2) that conduct other than "discharge" was encompassed by and could constitute a violation of the ADEA; (3) that a *prima facie* case was established by showing (a) the Plaintiffs were in the protected class; (b) they were qualified to perform the duties of their job; and (c) younger persons were more favorably treated by being hired for, promoted to, or replacing Plaintiffs from a job for which Plaintiffs were qualified and available to assume. Further, the Plaintiffs offered evidence, in the form of three affidavits more fully discussed in the following section, controverting the company's articulated non-discriminatory reasons for never recalling Plaintiffs and thereby raised an issue regarding pretext as to such stated reasons.

The district court granted summary judgment in favor of Grocers Supply Company on April 8, 1991. In its opinion, the district court found the Plaintiffs' *prima facie* case lacking in three elements. First, the Plaintiffs were not "discharged"; second, the Plaintiffs presented no evidence of the class members' ages or that all of them were over forty; and third, the Plaintiffs offered no evidence that they were replaced by younger employees. The court assumed the Plaintiffs to be qualified. Further, the district court then held that even assuming a *prima facie* age case could be established, the Plaintiffs' ADEA claim would be preempted by the NLRA.

The Plaintiffs timely perfected their appeal to the Fifth Circuit Court of Appeals. This case was consolidated in the appellate court with case no. 91-6043, *James E. Hamilton, et. al, vs The Grocers Supply Company, Inc.*

which had been tried separately at the trial court level. The Fifth Circuit Court of Appeals held that the ADEA claim was not preempted by the NLRA but, nevertheless, affirmed the summary judgment in the *Britt* case and directed verdict in the *Hamilton* case on the grounds that the Plaintiffs had failed to prove that the reasons offered by the Defendant for failing to recall the Plaintiffs to their former positions were pretextual. The appellate court apparently assumed the existence of a *prima facie* case.

The *Hamilton* plaintiffs timely filed a petition for rehearing arguing that the issue of pretext had never been reached in their case because the trial court granted a directed verdict at the close of their case-in-chief. The *Britt* plaintiffs did not file a similar petition for rehearing because pretext was clearly an issue in the summary judgment proceedings. The Fifth Circuit agreed procedurally with the *Hamilton* plaintiffs but denied rehearing and affirmed the trial court on other grounds. In its opinion on petition for rehearing, the court below did not address the *Britt* facts or change its reasoning for affirming summary judgment in the *Britt* case.

REASON FOR GRANTING CERTIORARI

CERTIORI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN THE OPINIONS OF THE LOWER COURTS REGARDING THE SUFFICIENCY OF EVIDENCE NECESSARY TO CREATE A JURY ISSUE ON THE QUESTION OF PRETEXT IN AN AGE DISCRIMINATION CASE WHERE AGE RELATED COMMENTS ARE RELIED UPON, IN PART, BY THE ADEA PLAINTIFF.

As the Fifth Circuit noted in its opinion below, it is relatively easy for an ADEA plaintiff to establish a *prima facia* case and the Defendant-employer to articulate a non-discriminatory reason for the decision or action in question. See also *Amburgey vs. Corhart Refactories Corp., Inc.*, 936 F.2d 805, 811 (5th Cir. 1991). Therefore, most cases of this nature are resolved, as indeed this case was, at that stage of inquiry which considers whether the Defendants articulated reasons are "pretextual". That inquiry necessarily leads into consideration of the Defendant-employer's motivation and most frequently an ADEA plaintiff will rely upon age related comments as either direct or indirect evidence of the employer's true motivation in reaching the decision in question. This case presents an opportunity for the Supreme Court to consider the important question of to what extent an ADEA plaintiff might rely upon, and what weight should be given to, age related statements occurring in the workplace when attempting to determine the true motivation of the employer.

In this case, the focus was on the company's permanent replacement of the Plaintiffs and its failure to ever recall the Plaintiffs to their former jobs. The Plaintiffs contended that their permanent replacement was a sham or subterfuge and that the company would not allow them to return to work because of their age. The reasons articulated by the company for permanently replacing the Plaintiffs was that the temporary employees were leaving the company to take permanent jobs elsewhere and the company was grateful to the temporary employees for keeping it in business during the strike. Further, the company stated that the Plaintiffs were never recalled to their former positions simply for the reason that no positions became open or available.

A plaintiff may show that the employers' articulated reasons are pretextual by proving either (1) that a discriminatory reason more likely motivated the employer, or (2) that the employers' reason is unworthy of credence. *Texas Dep't. of Community Affairs vs. Burdine, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 1093-95 (1981).* A variant of that test states that the plaintiff can establish pretext by proving that the reasons stated by the employer, "though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext". *Normand vs. Research Institute of America, Inc., 927 F.2d 857, 859 (5th Cir. 1991).* In the summary judgment context, however, the question is not whether the plaintiff proves pretext, but, rather, whether the plaintiff presents evidence which raises a genuine issue of fact regarding pretext. *Burdine,* supra 450 U.S. 256, 101 S. Ct. at 1095. In other words, to defeat a summary judgment motion on the issue of whether defendant's proffered non-discriminatory reason was pretextual, a plaintiff need only point to evidence which could support a reasonable inference that the employer's explanation is unworthy of credence. The plaintiff is not required to produce evidence which "necessarily leads" to the conclusion that the employer acted for discriminatory reasons. *Sorba vs. Pennsylvania Drilling Co.*, 821 F.2d 200, 205 (3rd Cir. 1987), Cert. denied, 484 U.S. 1019, 108 S. Ct. 730, 98 L. Ed. 2d 679 (1988).

A. SUMMARY JUDGMENT EVIDENCE ON PRETEXT

In the summary judgment proceedings, which were subject to review by the Fifth Circuit, the Plaintiffs offered three (3) affidavits to establish the existence of a genuine issue of material fact both as to motivation and credibility on the part of the company regarding its explanation for permanently replacing and refusing to recall Plaintiffs to their former positions. These three affidavits contained testimony

by employees, other than Plaintiffs, of the company attesting to age related comments by the company's upper level management which could have a possible age bias implication, *coupled with* actual personnel practices on the part of the company observed by each witness which would belie the truth of the company's articulated non-discriminatory reasons.

The first affidavit was that of Rose Joubert, who was employed by the company from 1981 through December 28, 1987, as an industrial nurse in the company's "medical services" department. In the normal course of her employment, she was in charge of the employees' medical files, responsible for physical examinations required by the D.O.T., and reviewed and processed insurance claims for both job related and non-job related injuries and insurance claims. Additionally, during the strike, she personally worked with the personnel department in taking and processing job applications to fill the vacancies created by the striking employees, including Plaintiffs.

In her affidavit, Ms. Joubert testified both to (a) statements made by persons involved with the company's upper level management that had age biased implications, and (b) personnel practices implemented by the company which directly contradicted the reasons articulated by the company for not recalling Plaintiffs and which could support an inference of discriminatory conduct on the part of Defendant. The age related comments which Ms. Joubert testified to were attributed to Mr. Bob Silverman, a special management consultant, who on several occasions requested the affiant to provide him with medical information from her files that would help him get rid of older employees. Mr. Silverman also stated on numerous occasions that the company's biggest problem was that the employees were "too old and making to much money." She further testified that

the promotion of the temporary replacements to "permanent employees" was done to eliminate an excessive temporary work force which was hired immediately after the strike commenced rather than to staunch the flow of temporary employees leaving to find permanent work as the company contended. She also testified to the fact that the company would hire employees to subsidiaries and use them to fill jobs which otherwise would have been available to the Plaintiffs and that the so-called "permanent replacements" were more accurately characterized as permanent part time workers because they were never allowed to obtain full benefits normally attendant to permanent employment with the company. Finally, based upon the personnel practices which she actually observed and was instructed to carry out, Ms. Jorbert offered her lay opinion that the company was discriminating against its older employees.

The second affidavit offered by Plaintiffs addressing the issue of pretext was that of Ms. Pamela Reetz. This affiant was employed as a secretary and administrative assistant in the transportation department of the company and worked with management and supervisors within that department. She testified as to age biased statements attributed both to Mr. Robert Silverman and Mr. Robert Hunt, manager of the transportation department. Mr. Silverman was heard to state in several meetings that the drivers were "too old, making too much money, that benefits were excessive, and that the workers were lazy." Mr. Robert Hunt stated in several meetings of the supervisors that the drivers "were too old and lazy, and making too much money." Mr. Hunt also stated that the strike would allow the company to bring in a "fresh batch" of employees at a "cheaper price." Ms. Reetz also testified to the fact that after the strike ended and the Plaintiffs offered to return to work, there was a shortage of drivers; but, rather than recall the Plaintiffs, the company would work the replacement drivers

over the hours allowed by D.O.T. regulations and instructed her to alter the time cards so that the records would not reflect their actual time. She further testified to the fact that rather than recall the Plaintiffs, the company would utilize commercial labor pool employees at the rate of approximately 5-10 a day and bring in employees from subsidiary companies.

The last affidavit was that of Mr. Paul Dye who was an hourly employee of the company before, during and after the strike. Mr. Dye testified that after the strike ended and the Plaintiffs attempted to return to work, there was, contrary to what was stated by the company, a substantial rate of employee turnover. However, the company would not allow any of the Plaintiffs to return to work but rather used labor pool and subsidiary employees. Mr. Dye testified that several months after the strike had ended, Mr. Max Levit, Owner and President of the company, spoke to a meeting of the employees to encourage them to vote against union certification at an upcoming election. During this meeting, Mr. Levit was asked why the company was not recalling any of the Plaintiffs. In response, Mr. Levit characterized the prestrike workforce, including the Plaintiffs, to an "old car" and the new work force as a "new car." He stated that an "old car" is not as reliable and breaks down more often and the company did not want the "old car" anymore and preferred to keep the "new car."

The Fifth Circuit dismissed these three affidavits as containing nothing more than "stray remarks by three Grocers Supply employees concerning the age of the workers." The Court below held that the evidence offered by Plaintiffs was insufficiently probative to create a jury issue in an ADEA case. That holding is in conflict with other opinions of the appellate courts considering similar evidence on the issue of pretext.

B. CONFLICT AMONG OPINIONS OF THE FIFTH CIRCUIT

Not only does the holding below conflict with the opinions found in other circuits, it is in conflict with precedent which may be found within the Fifth Circuit. For example, the Fifth Circuit held in *Fowler vs. Carrollton Public Library*, 799 F.2d 976 (5th Cir. 1986) that age-related epithets by the Plaintiffs' immediate supervisor and by co-workers in the presence of the supervisor used behind the Plaintiff's back for a lengthy period of time, together with an "equivocal attitude" on the part of the employer toward the Plaintiff, constituted evidence probative of the employer's motivation toward the Plaintiff and required submission of the issue of pretext to the jury. In the case of *Bienkowski vs. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), the Fifth Circuit reversed summary judgment in favor of the Defendant employer and stated "[u]nlike the District Court, we are unwilling to assume that indirect comments about [the Plaintiff's] age and adaptability are not possibly probative of an unlawful discriminatory intent...". The comments to which the Court was referring in that case, "as carrying an age-based pejorative implication" consisted only of comments by the Plaintiff's supervisors making rather ambiguous statements regarding the Plaintiff's appearance if he was going to look for another job and comments on his inability or unwillingness to "adapt" to new systems. *Bienkowski, supra* at 1507, note 4. Later, in *Hansard vs. Pepsi Cola Metropolitan Bottling Company*, 865 F.2d 1461 (5th Cir. 1989), the Fifth Circuit followed its earlier opinion in *Bienkowski* and again held that indirect references to an employee's age can support an inference of age discrimination. The comments in that case consisted of a supervisor's question to the Plaintiff as to whether he felt he could handle the new position which involved some heavy

lifting and a passing comment by an employee relations trainee that it was "kind of risky considering [the Plaintiff's] age". *Hansard,* supra at 1465-66. *Hansard* is also significant in that the Fifth Circuit allowed a former employee to offer lay testimony as to his opinion, just as Ms. Joubert offered in this case, regarding age discrimination by the company where his opinion was based on his own experience in the corporation. In *Normand vs. Research of America, Inc.*, 927 F.2d 857, 859 (5th Cir. 1991), the Fifth Circuit yet again concluded that age related comments by supervisors are probative of motivation and even indirect references to an employee's age can support an inference of age discrimination (927 F.2d at 864 n.4).

C. CONFLICT WITH OPINIONS OF OTHER CIRCUITS

Further, the opinion below in this case is in conflict with numerous opinions from other circuits considering the probative value of age related comments. For example, the Third Circuit in *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3rd Cir. 1990) held that a managers often used phrase "old dogs won't hunt", even though not directed at any specific individual, was probative evidence on the issue of pretext and, when considered with nothing more than the fact that the Plaintiff had received good evaluations prior to her termination should have allowed the ADEA Plaintiff to withstand the Defendant's motion for summary judgment. Similarly, in the case of *Spulak v. K-Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990), the Tenth Circuit considered evidence that a manager told another employee that "these old fogies are either going to have to comply or get out" and held "that such remarks, even if made in jest, are probative of pretext." Citing *Cooper vs. Asplundh Tree-expert Company*, 836 F.2d 1544, 1548 & n. 2 (10th Cir. 1988). The Seventh Circuit has

also given probative weight to statements which have possible age biased implications. In *U.S.E.E.O.C. vs. Century Broadcasting Corp.*, 957 F.2d 1446 (7th Cir. 1992), that circuit considered statements made by company management that were not even directed in general to its employees but, rather, described a change to a new broadcasting format. There, the Plaintiff introduced into evidence statements by management that the station was "looking for a new young sound" and wanted to "attract a younger audience", that the current format sounded "old and lethargic", that the target audience "does not like the old sound", and that the desired audience could be reached by "giving the station a younger feeling." The Seventh Circuit held that such statements, "though subject to an 'innocent' interpretation, could support an inference of age discrimination when added to the fact that the fired announcers were over 40 years old..." (957 F.2d at 1457).

Your petitioner recognizes that a common thread in all the opinions just cited is that the age related comments were considered in conjunction with other facts offered into evidence. As Plaintiffs in the trial court and Appellees in the court of appeals, Petitioners strenuously argued that the age related comments on the part of management which were introduced into evidence should be considered along with other specific facts testified to by the witnesses (see discussion of affidavits above). The trial court and the appellate court below summarily dismissed Plaintiffs' evidence on the issue of pretext as containing nothing more than "stray remarks in the work place" without considering such statements in light of or in conjunction with the other facts testified to. Indeed, the court below did not even acknowledge in its opinion that the statements offered by the Plaintiffs were attributable to the Defendant's high level management, including its president and principal shareholder, Mr. Max Levit.

In this case, as in *Normand,* supra which represents the Fifth Circuit's most recent pronouncement on the question presented by this petition, Britt and Jackson, both individually and as representative Plaintiffs, presented more than their subjective belief of discrimination and more than "stray remarks" or conclusory statements of age discrimination by other employees in the workplace. Rather, they produced evidence which, considered in its entirety, created a material issue of fact regarding the truth and credibility of the reasons articulated by the Defendant for permanently replacing and never recalling Plaintiffs to their former positions. In light of such evidence, a jury could find in favor of either party on the question of pretext but, as the Third Circuit determined in *Siegel,* supra, "[t]his is precisely the sort of question which must be left to the jury" and granting of summary judgment is erroneous (894 F.2d at 55).

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. Petitioners herein respectfully pray that a Writ of Certiori issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 15, 1992.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS
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RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-6043

James E. Hamilton, et. al,
Plaintiffs-Appellants,

VERSUS

The Grocers Supply Co, Inc.
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM, AND DUHÉ, Circuit Judges.

DUHÉ, Circuit Judge:

The Hamilton plaintiffs request a rehearing on our ruling in *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992). They contend that we erred in holding that the directed verdict on their ADEA claims should be sustained because they failed to show pretext. We agree, however, rehearing is denied because plaintiffs failed to establish a *prima facie* case.

The district court held that the plaintiffs failed to establish a *prima facie* case, and dismissed the case after the close of plaintiff's case-in-chief. Our decision affirmed the district court's decision, however, we affirmed on the grounds that the plaintiffs failed to show that the defendant articulated nondiscriminatory reasons for refusing to rehire plaintiffs constituted pretext. The Hamilton plaintiffs argue that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), requires a plaintiff in its case-in-chief to establish only a *prima facie* case. They contend that *McDonnell Douglas* establishes a three step burden shifting process in which the plaintiffs are required to show pretext only after the defendants have articulated a nondiscriminatory reason for failing to rehire. *McDonnell Douglas Corp.*, 411 U.S. at 802. Although plaintiffs argued before this Court that they had proven pretext, we agree that procedurally they are correct. We do not agree, however, that they are entitled to a rehearing.

The standard or review for a directed verdict is the same as that for review of a summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986). We apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes

that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict and for JNOV] is proper." *Boeing Company v. Shipman*, 411 F.2d 365,374 (5th Cir. 1969)(en banc); *Little v. Republic Refining Co.*, 924 F.2d 93, 95 (5th Cir. 1991).

To establish a violation under the ADEA, the plaintiffs must show some adverse employment action by the defendant. *See Young v. Houston*, 906 F.2d 177 (5th Cir. 1990); *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503 (5th Cir. 1988). When the plaintiff has not introduced direct evidence of discrimination, he may still shift the burden of proof to the defendant by establishing a *prima facie* case as required by *McDonnel Douglas*. *Young*, 906 F.2d at 180. To make out a *prima facie* case, the plaintiff must prove the necessary elements "by a preponderance of the evidence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The elements of a *prima facie* case may be somewhat flexible in an ADEA case according to the facts in issue. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). *See Moore v. Sears, Roebuck & Co.*, 464 F.Supp. 357, 361-63 (N.D.Ga. 1979). The district court articulated a three part test that the plaintiffs had to meet in order to establish a *prima facie* case. They had to show (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; (3) the protected workers were qualified for the jobs. The plaintiffs argue that this test is inappropriate under the facts in this case. We disagree.

The plaintiffs voluntarily went on strike, forcing the company to hire replacements. The replacements were eventually made permanent, and few of the striking workers were ever recalled. The plaintiffs claimed adverse treatment based on two of Grocers' employment decisions: (1) the

decisions to permanently replace the striking workers and (2) the failure to recall the strikers as positions became available. They contend that these decisions were motivated by age discrimination because the replacement workers as a group were younger than the striking workers as a group.[1] Relying on *Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987), the plaintiffs argue that it is unlawful under the ADEA to eliminate older employees as a group based on higher salaries so as to replace them with generally younger workers, who would work for less. In addition to being factually distinguishable from *Metz*, this Court has not adopted the *Metz* line of reasoning, and we decline to do so in this case. *See Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir. 1991) (termination due to higher pay is not relevant to age discrimination but seniority); *Williams v. General Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981), *cert. denied*, 455 U..S. 943 (1982) (seniority and age discrimination are unrelated).

This Court has held that the plaintiff "must show that [the employer] gave preferential treatment to a younger employee under 'nearly identical' circumstances." *Little*, 924 F.2d at 97. We agree with the district court that comparing the recall of older strikers with the recall of younger strikers provides more meaningful evidence of differential treatment than does a comparison of the strikers with their replacements. Additionally, age differences between an established workforce and a newly hired one are only natural. "[I]n a normal case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in." *Laugesen v. Anaconda Company*, 510 F.2d

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[1] Members of the plaintiffs' group include workers under 40 years old.

307, 313 n. 4 (6th Cir. 1975). Consequently, we conclude that the test articulated by the district court was appropriate under the facts of this case.

The plaintiffs failed to meet the test set out by the district court. They failed to establish that the company refused to consider recall applications of protected employees over age forty. The record indicates that of the 34 strikers who were returned to work prior to the end of the strike, 20 were age forty or over. All of the remaining strikers, regardless of age, were permanently replaced. Pursuant to the recall agreement, the defendant made 120 recall offers. The average age of the strikers to whom these offers were made was 49.4 years old. Of the 120 offers, 104 went to persons age 40 or over, while only 16 went to persons under age 40. In light of the lack of evidence showing that younger strikers were more favorably treated than older strikers, we conclude that the plaintiffs have not established a *prima facie* case.

For the foregoing reasons, the request for rehearing is DENIED.

92-1577

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. ET AL,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Rrespondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NO. _____

IN THE

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RICHARD L. BRITT AND TIMOTHY JACKSON, JR. ET AL,
Petitioner,
v.
THE GROCERS SUPPLY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Now come Petitioners and through the undersigned file this Supplemental Appendix to the Original Petition for Certiorari heretofore filed on March 15, 1993. Submitted herewith as Appendix "B" is the opinion of the Fifth Circuit Court of Appeals entered on December 15, 1992, which decision is sought to be reviewed and Appendix "C" which is the opinion of the District Court for the Southern District of Texas originally granting summary judgment in favor of Defendant and against Plaintiffs.

Respectfully submitted,

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Counsel for Petitioners

SUPPLEMENTAL
APPENDIX B

Richard L. BRITT and Timothy Jackson,
Jr., et al., Plaintiffs-Appellants,

v.

The GROCERS SUPPLY COMPANY,
INC., Defendants-Appellee.

James E. HAMILTON, et al.,
Plaintiffs-Appellants,

v.

The GROCERS SUPPLY COMPANY,
INC., Defendant-Appellee.

Nos. 91-2493, 91-6043.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1992.

Striking employees replaced by allegedly younger workers brought age discrimination action and claim that employer had breached contract in replacing workers. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 760 F.Supp. 606, entered judgment for employer. Appeal was taken. The Court of Appeals, Duhé, Circuit Judge, held that: (1) Age Discrimination in Employment Act was not preempted by National Labor Relations Act; (2) employees had not established violation of Age Discrimination in Employment

Act, to degree sufficient to survive summary judgment; and (3) employer's actions did not constitute violation of labor contract.

Affirmed.

1. Federal Courts 666

All employees bringing age discrimination claim against employer were included in an appeal from adverse decision of district court, even though they were not individually identified in notice of appeal; notice stated that it covered all plaintiffs who had filed their written consent to be included in lawsuit. F.R.A.P. Rule 3(c), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

2. Civil Rights 332

The Age Discrimination in Employment Act was exclusive remedy for age discrimination claims, and was not preempted by National Labor Relations Act. National Labor Relations Act, §§ 1-303, as amended, 29 U.S.C.A. §§ 151-187; Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

3. Civil Rights 380

Once an age discrimination claimant establishes prima facie case, presumption of discrimination is established and burden of production shifts to employer to rebut presumption by articulating legitimate, nondiscriminatory reason for its disparate treatment of claimant, following which claimant must prove defendant's reasons are pretexts for unlawful discrimination either by showing discriminatory reason more likely motivated employer or employer's reason is unworthy

of credence. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

4. Civil Rights 389

Assuming that striking workers at food handling facility had established prima facie case of age discrimination in connection with employer's response to a strike, they failed to establish fact issue as to whether the employer's reasons for hiring temporary employees as permanent employees, gratitude, departure of these employees to take other jobs, and striker misconduct, were pretexts masking age discrimination; reliance upon stray remarks that replaced workers were "older" and fact that replaced workers had higher salaries and more seniority, were not sufficient. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

5. Labor Relations 264

Employer did not breach contract with union, allegedly calling for rehiring of striking employers if they immediately agreed to cease strike, by engaging in selective reemployment of striking workers; there was no evidence that union had ever accepted employer's offer to so rehire, and union subsequently agreed to an unconditional return to work. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. §185.

6. Labor Relations 416.5

Striking employees were precluded from claiming that employer had breached a recall agreement, by failure to follow binding arbitration provisions in collective bargaining agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A § 185.

7. **Damages** **50.10**
States **18.15**
Torts **6**

State law causes of action of duress and intentional infliction of emotional distress, based upon alleged violation of contract between employer and union governing the recall of striking workers, was not preempted by the National Labor Relations Act. National Labor Relations Act, §§ 1-303, as amended, 29 U.S.C.A. §§ 151-187.

8. **Damages** **50.10**
States **18.15**
Torts **6**

State law claims of duress and intentional infliction of emotional distress, arising out of an employer's failure to recall striking employees due to age discrimination, were not preempted by the Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §§ 2-17, as amended, 29 U.S.C.A. §§ 621-634.

9. **Torts** **6**

Employer did not commit state law tort of duress by declining to restore all striking workers to their previous positions; employer was merely insisting on its legal right in a permissible way.

10. **Damages** **50.10**

Employer did not commit state law tort of intentional infliction of emotional distress by declining to restore all striking workers to their previous positions; employer was merely insisting on its legal rights in permissible way.

Appeals from the United States District Court for the Southern District of Texas.

Before **REAVLEY, HIGGINBOTHAM,** and **DUHÉ,** Circuit Judges.

DUHÉ, Circuit Judge:

These two cases were consolidated on appeal, but tried separately. Both suits were brought by groups of former employees of Grocers Supply Company. The Britt plaintiffs appeal the district court's holding that the National Labor Relations Act, 29 U.S.C. § 151 - 187 (1988), preempts claims of age discrimination asserted under the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (1988). They also appeal the district court's granting summary judgment on the merits of their age discrimination claims. 760 F.S. 606. The Hamilton plaintiffs appeal the district court's granting a directed verdict in favor of the defendants on the plaintiff's age discrimination claims. They also appeal the district court's granting summary judgment on their claims of breach of contract and intentional infliction of emotional distress and duress. The defendant, Grocers Supply, argues that the Britt plaintiffs' notice of appeal is insufficient under Rule 3(c) of the Federal Rules of Appellate Procedure. We find that the Age Discrimination in Employment Act (ADEA) controls this litigation and not the National Labor Relation Act (NLRA) and that notice of appeal by the Britt plaintiffs was sufficient under Rule 3(c) and its interpretation in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). Additionally, we find no error in the summary judgment in the Britt case, nor do we find error in the directed verdict or summary judgment in the Hamilton case. In sum, we disagree with the district court on the preemption issue but affirm its judgment.

STATEMENT OF FACTS

The underlying facts in both cases are the same. In December 1986, the work force of Grocers Supply Company, a Texas Corporation, went on strike after contract negotiations broke down. The work force consisted primarily of employees over forth years old. Grocers Supply immediately hired replacement workers to continue its operations. The replacement workers were told that their positions were temporary; sometime before the end of the strike, however, Grocers offered them permanent positions. Negotiations failed, and in April 1987, the striking workers made an unconditional offer to return to work. The Union explained to the workers that they could return to work only when Grocers needed them. In fact, Grocers and the Union negotiated a "recall" agreement to govern the order of recall as vacancies occurred. The Hamilton plaintiffs contend that this offer to return to work was made in response to a promise by Grocers that if the workers would return unconditionally, they would all be rehired within a few weeks.

Very few of the former workers were ever recalled. Grocers maintains that it simply had a few hiring needs during this period due to the low turnover and increased productivity of its new workers. The Plaintiffs assert that the slow rehiring and the undesirability of those jobs offered was purposefully orchestrated to reduce the age of the work force and to encourage older workers to retire and take their retirement benefits.

Two groups of workers sued Grocers as a result of their failure to be recalled. Richard L. Britt and Timothy Jackson, Jr., individually and on behalf of others similarly

situated, with 126 additional plaintiffs opting in,[1] assert only a ADEA claim. They contend that their "permanent replacement" was a sham and that they were refused reinstatement because of their age. The district court granted summary judgment on this claim based on two grounds. First, the court held that the ADEA claim was preempted by the NLRA. Second, the district court held that Britt failed to demonstrate a genuine issue of material fact on the discrimination claim sufficient to survive judgment.

James E. Hamilton, et al. assert an ADEA claim, a 29 U.S.C. § 301 breach-of-contract claim, and state law claims of intentional infliction of emotional distress and duress. The district court granted summary judgement for Grocers on both the § 301 contract claim and the state law claims. The ADEA claim went to trial, but the district court directed a verdict for Grocers at the close of Hamilton's evidence.

DISCUSSION

I. *Notice of Appeal.*

[1] Before addressing other issues, we must address whether the Notice of Appeal for the Britt plaintiffs is sufficient. Grocers contends that the notice is insufficient to satisfy the specificity requirement under Federal Rule of Appellate Procedure 3(c) and its interpretation under *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct 2405, 101 L. Ed. 2cd 285 (1988).

Rule 3(c) provides that a notice of appeal "shall specif, the party or parties taking the appeal." In *Torres*,

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1. For simplicity purposes, the plaintiffs in each case will be referred by the named individual plaintiffs, Britt and Hamilton.

the Supreme Court interpreted FRAP 3(c) strictly and held that the designation "*et al.*" in the notice of appeal rather than the name of the appealing party resulted in a failure of that party to appeal, thus depriving the appellate court of jurisdiction.

"The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 487 U.S. at 318, 108 S.Ct. at 2409. The problem facing the Supreme Court in *Torres* was that the use of *et al.*, with nothing further, left it uncertain which parties were taking the appeal. The Court held that thus designating the appealing parties "would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment. "*Id.* The Court, however, went on to state that the specificity requirement of Rule 3(c) may be met "by some designation that gives fair notice of the specific individual or entity seeking to appeal." *Id.*

The plaintiffs in the Britt case consist of the original named plaintiffs, Richard Britt and Timothy Jackson, and another 126 optin plaintiffs under 29 U.S.C. § 216(b). The Notice of Appeal was styled "Richard L. Britt and Timothy Jackson, Jr., et al." The body of the notice, however, identified the remaining appellants as "all other 129 consenting Plaintiffs who have previously filed their written consent persuant to 29 U.S.C. Section 216(b)."[2] Because the notice in this case states that all of a particular defined

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2. Grocers also argues that the notice is uncertain because it refers to 129 opt-in plaintiffs and in reality only 126 persons had opted into the action. Apparently, the 129 was a typographical error. This argument is without merit. If "all 129" were appealing , it follows that the 126 plaintiffs that Grocers was aware of were all appealing.

group are taking an appeal, and the individual identities are readily ascertainable in the record, the specificity requirement is satisfied. Such a designation is sufficient to give fair notice of the individuals appealing.

The cases relied on by Grocers involve situations in which the unnamed appellants could be included only if the term "et al.", with nothing further, was considered specific enough to satisfy Rule 3(c). The Notice of Appeal in this case is distinguishable. The plaintiffs, other than the two named plaintiffs, were clearly identified as those parties "who filed their written consent" as required by Section 216(b). Their identities are in the record. Rule 3(c) does not require that all the plaintiffs be identified by given and surname in the notice of appeal. This Court has stated that it "has looked to the purpose rather than the letter of Rule 3(c)'s specificity requirement" when determining the sufficiency of a notice of appeal. *Brotherhood of Ry. Carmen v. Atchison T. & S.F.Ry.*, 894 F.2d 1463, 1465 n. 3(5th Cir.), *cert. denied* — U.S. —, 111 S.Ct. 131, 112 L.Ed.2d 99 (1990).

Additionally, this Court has recognized that in some circumstances even the designation "et al." is sufficient to identify the parties. In *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127, 129 (5th Cir. 1989), this Court held that the use of "et al." is sufficient if there are only to parties to the suit. Thus, it is not necessary to list the names of each appealing party, as long as there can be no mistake about which parties are intending to appeal. If papers are filed in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. *See Torres*, 487 U.S. at 317, 108 S.Ct. at 2408; *see also Houston v. Lack*, 487 U.S. 266, 273-75, 108 S.Ct. 2379,

2383-84, 101 L.Ed.2d 245 (1988). Unlike the defendant in *Torres*, Grocers had fair notice of the identity of the Appellants. Consequently, its argument that this Court lacks jurisdiction over Britt's appeal must fail.

II. The Preemption Issue.

[2] Turning to the question whether this Court has jurisdiction over the age discrimination claims, we hold that this Court does have jurisdiction to hear the claims asserted under the Age Discrimination in Employment Act (ADEA).[3] More specifically, we hold that, to the extent the age discrimination claims encompass conduct that is arguably covered by the National Labor Relations Act, the ADEA governs the prosecution of those claims and not the NLRA.

The issue of the jurisdiction of this Court was raised on appeal in the Britt case. Although not raised by the Hamilton plaintiffs, it is our duty to determine, *sua sponte*, if necessary, whether we have jurisdiction over any case before us. *Griffith v. Johnston*, 899 F.2d 1427, 1429 (5th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991); *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83 (5th Cir. 1990). Therefore, our decision on this issue affects the disposition of both cases on this appeal.

A. Preemption Analysis

Whether the NLRA preempts the ADEA, or vice versa, is an issue of first impression before this court. The district court in the Britt case determined, in a summary judgment proceeding, that the plaintiffs' ADEA claims were

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3. If the NLRA preempts the ADEA, then primary jurisdiction of this dispute lies with the NLRB and not the courts.

preempted by the NLRA. The court alternatively held that, on the merits of the ADEA claim, the plaintiffs failed to establish a genuine issue of fact and granted the defendant's motion for summary judgment. The defendants in the Hamilton case also argued that the NLRA preempted the ADEA; however, the district court overruled this argument without explanation. The plaintiffs later lost on the ADEA claims by a directed verdict.

The district court in Britt, in determining that the NLRA preempted the ADEA, relied on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). We believe, however, that such reliance is misplaced. Moreover, Grocers' application of the preemption doctrine in its argument on appeal is also flawed.

The preemption doctrine in labor law has evolved for more than three decades around a conceptual core with various appendages.[4] An initial line of preemption analysis, developed in *San Diego Building Trades Council v. Garmon*[5] and its progeny, was based predominantly on the primary jurisdiction of the National Labor Relations Board (NLRB). A second line of analysis also developed in cases "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because [it has been] left 'to

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4. *See* 2 Charles J. Morris, *The Developing Labor Law* 1504-1598 (2d ed. 1983); Charles J. Morris, *The Developing Labor Law*; 1982-1988, 650-690 (2d ed. Supp. V 1989).

5. 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). This type of preemption is called "Garmon" preemption.

be controlled by the free play of economic forces.'"[6] The resulting preemption doctrine reflects the Supreme Court's

efforts to accommodate conflicting regulatory schemes without the need to take a strictly mechanistic approach to the discrete problems involved.

The preemption doctrine is anchored in the Supremacy Clause of the Constitution. In determining the areas of labor law in which the states have overstepped their bounds, the Supreme court has focused on Congress' actual regulation of labor relations rather than Congress' potential power to regulate in this area.

Since the enactment of the NLRA, the Supreme Court has justified the results of its preemption decisions in terms of perceived congressional intent to preempt, although the Act provides no specific guidance for applying this principle in individual instances of regulatory conflict. As the theory of preemption has evolved, the more recent cases reflect the difficulty of discerning congressional intent and instead appear to have been decided upon considerations of labor relations policy. *See Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 766-68 (5th Cir. 1989).

As stated in *Windfield*, the courts have carved out several significant exceptions to the preemption doctrine. One such exception is the "collateral issue" exception. In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626, 95 S.Ct. 1830, 1836, 44

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6. *Lodge 76, International Ass'n of Machinists & Aerospace Workers, v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140, 96 S.Ct. 2548, 2553, 49 L.Ed.2d 396 (1976). This type of preemption is sometimes called "Machinist" preemption.

L.Ed.2d 418 (1975), the Court held that a *federal* antitrust law was *not* preempted by the NLRA under the collateral issue exception. Under *Garmon*, however *state* antitrust law was preempted. The Court held that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Id.* at

626, 95 S.Ct. at 1837. As an independent federal remedy, the ADEA falls under this exception.[7] Traditional preemption analysis, however, is still not quite satisfactory.

B. Preemption and Conflicts between Federal Statutes

Because the root of the preemption doctrine lies in the tension between federal and state regulation of labor relations, the analysis of the tension between two conflicting federal statutes is somewhat different. A number of cases reflect this awareness.[8] In *United States v. Boffa* 688 F.2d

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7. Although the Court calls this an exception to the preemption doctrine, the analysis is more comparable to that of *Hood v. Smith's Transfer Corp.*, 762 S.Supp. 1274 (W.D.Ky. 1991), discussed *infra*, which candidly recognized that the preemption doctrine does not apply in situations where two federal statutes conflict.

8. In *United States v. International Brotherhood of Teamsters*, 948 F.2d 98 (2d Cir. 1991), *vacated sub nom. Yellow Freight Systems, Inc. v. United States*, — U.S. —, 113 S.Ct. 31, — L.Ed.2d — (1992) (No. 91-1938), the court determined that the district court was entitled to exercise jurisdiction over the parties pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction by the authority of the NLRB to determine issues concerning unfair labor practices under the NLRA. The following excerpt illustrates the inapplicability of the traditional preemption analysis when two federal statutes are involved.

> [Appellant] contends that the conduct at issue

in this case is directly regulated by sections 7 and 8(a)(1) of the NLRB. . . and accordingly that the NLRB has exclusive jurisdiction with respect to it. In this connection, *San Diego Building Trades Council v. Garmon*, . . . a case involving attempted state regulation of conduct constituting an NLRA unfair labor practice, stated that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [NLRB], if the danger of state interference with national policy is to be averted." . .

This rule, however, is not uniformly applied even as to state regulation. *See, e.g., Sears Roebuck & Co. v. San Diego County Council of Carpenters*... (enforcement of state trespass laws by state court allowed as to "picketing which is arguably-but not definitely-prohibited or protected by federal law") Furthermore, where federal law and policies other than the NLRB are implicated, the *Garmon* rule is frequently considered inapplicable. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989) ...(district court had jurisdiction to hear fair representation claim although union's breach of duty of fair representation might violate § 8(b) of the NLRA); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 237-39, 91 S.Ct. 609, 612-13, 28 L.Ed.2d 10 (1971)(district court had jurisdiction to hear claim that unlawful expulsion from union violated § 101(a)(5) of Labor-Management Reporting and Disclosure Act ... although expulsion was arguably an unfair practice violative of §§ 8(b)(1)(A) and 8(b)(2) of NLRA); ... *United States v. Boffa*, 688 F.2d 919, 931 (3d Cir. 1982) (in RICO prosecution alleging mail fraud predicates and substantive mail fraud violations, prohibitions of defendants' conduct by § 8 of the NLRA would not preclude "enforcement of a federal statute that independently proscribes that conduct"). *cert. denied*, 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494

919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022, 103 S.Ct. 1272, 75 F.Ed.2d 494 (1983), the issue was whether the doctrine of primary jurisdiction operated to displace a federal criminal statute that independently prohibited conduct that is also arguably prohibited by the NLRA. In rejecting preemption by the NLRA, the court stated "the doctrine of primary NLRB jurisdiction is of constitutional dimension; it is grounded, at least in part, upon considerations of federal supremacy . . . . No such constitutional concerns are implicated when a federal criminal statute is said to impinge upon the primary jurisdiction of the NLRB." *Id.* at 932.

Hood v. Smith's Transfer Corp., 762 F.Supp. 1274 (W.D.Ky. 1991), provides the most comprehensive discussion of the preemption doctrine and its relation (or lack thereof) to the analysis of two conflicting federal statutes. In holding that the preemption doctrine has no application when two federal statutes conflict, the court determined that the ultimate resolution of the issue depended upon whether: "(1) the unfair labor practices alleged by defendants are merely collateral to plaintiffs' non-NLRA federal claims and (2) plaintiffs' non-NLRA federal claims arise under statutes which provide independent federal remedies." *Id.* at 1283. In the case we are considering the plaintiffs' non-NLRA federal claims arise under the ADEA which provides an independent federal remedy.

(1983). Here, although the appointed officials are directly applying the NLRA rather than some separate body of law, considerations that we have previously recognized with respect to the Consent Decree argue compellingly for a ruling against exclusive NLRB jurisdiction. *Id.* at 105 (emphasis added) (some citations omitted).

Additionally, we have held that claims under Title VII are not preempted by the NLRA[9] These cases hold that a remedy is available under both the NLRA and Title VII and recognize concurrent jurisdiction between Title VII and the NLRA.[10]

As evidence by the discussion above, traditional preemption analysis does not apply in a conflict between two federal statutes.

C. Hobbs v. Hawkins

The most recent case in this Circuit to apply the preemption doctrine is *Hobbs v. Hawkins*, 968 F.2d 471 (5th Cir. 1992). The analysis in *Hobbs*, however, is inapplicable in this case. This decision holds that a claim under 42

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9. We have recognized that Title VII and the NLRA are statutes with separate and independent remedies. *See Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 658 (5th Cir. 1974), *overruled on other grounds by Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987), *vacated* 492 U.S. 901, 109 S.Ct. 3207, 106 L.Ed.2d 558 (1989), *reinstated on remand*, 887 F.2d 609 (5th Cir. 1989), *cert. denied*, 494 U.S. 1061, 110 S. Ct. 1539, 108 L.Ed.2d 778 (1990). The *Guerra* panel noted that

> through Title VII and the NLRA may overlay in the area of employment discrimination, their confluence must not be exaggerated .... [A] plaintiff does not lose his right to an adjudication regarding the causes of action created by Title VII ... simply because the conduct of which he complains also offends section 8 of the NLRA.

Guerra, 498 F.2d at 658 n. 46.

10. *Guerra*, 498 F.2d at 651 n. 20, and cases cited therein. Because of the cases holding that the ADEA is the *exclusive remedy* for age discrimination claims and those cases rejecting an analogy between Title VII and the ADEA, we decline to hold that the courts under the ADEA and the NLRB have concurrent jurisdiction over these claims.

U.S.C. § 1983 is preempted by the NLRA. *Hobbs* employs traditional preemption analysis which considers the relationship between federal and state regulation of labor relations rather than addresses the problems involved with conflicting federal statutes. *Hobbs* is unique, however, because the plaintiff's claims arose specifically under the NLRA (§ 7, § 8, and § 9), and were asserted as such. The plaintiff merely tried to enforce these NLRA claims through § 1983.

Section 1983 does not create substantive rights, but was designed to provide a remedy for violations of other statutory as well as constitutional rights. Many cases hold that, where Congress has enacted a statute that covers a *specific substantive area* providing *specific remedies*, a cause of action under § 1983 is foreclosed. In the case at hand, the ADEA covers a specific substantive area of the law and provides a specific remedy for violations of the statute. As a result, a number of cases also hold that an age discrimination claim brought under §1983 is preempted by the ADEA. Therefore, contrary to Grocers' assertions, the analysis in *Hobbs* does not control in this case.

D. The Exclusivity of the ADEA

Finally, a decision that the NLRA preempts the ADEA cannot be reconciled with the many cases holding that the ADEA is the exclusive remedy for age discrimination claims. *See White v. Frank*, 718 F.Supp. 592, 595 (W.D.Tex 1989), *aff'd*, 895 F.2d 243, (5th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 232, 112 L.Ed.2d 192 (1990); *Paterson v. Weinberger*, 644 F.2d 521, 524-25 (5th Cir. 1981); *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364, 1369 (4th Cir. 1989), *cert. denied*, 493 U.S. 850, 110 S. Ct. 147, 107 L.Ed.2d 106 (1989); *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983); *Ring v. Crisp County*

Hosp. Auth. 652 F.Supp. 477, 482 (M.D.Ga. 1987); *Dodson v. U.S. Army Fin. & Accounting Ctr.*, 636 F.Supp. 894 (S.D.Ind. 1986); *Morgan v. Humboldt County School Dist.* 623 F.Supp. 440 (D.C.Nev. 1985); *Tranello v. Frey*, 758 F.Supp. 841 (W.D.N.Y. 1991), *aff'd*, 962 F.2d 244 (2d Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (U.S. Sept. 29, 1992) (No. 92-704). This has been the holding in cases

of both federal employment and non-federal employment. Additionally, all of these cases hold that the ADEA preempts another federal statute.

In analyzing, whether the ADEA preempted § 1983, the court in *Ring v. Crisp County Hospital Authority, supra*, articulates the general rule: a precisely drawn, detailed statute preempts more general remedies. Because of the comprehensive statutory scheme set out under the ADEA and the lack of any legislative history indicating a contrary congressional intent, the *Ring* court concluded that the ADEA is the exclusive remedy for age discrimination. The court rejected an analogy to Title VII which has been held to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The court found that unlike Title VII, nothing in the legislative history of the ADEA indicated that Congress did not intend the ADEA to be the exclusive remedy. "By establishing the ADEA's comprehensive scheme for the resolution of employee complaints of age discrimination, Congress clearly intended that all claims of age discrimination be limited to the rights and procedures authorized by the ADEA." *Ring*, 652 F.Supp. at 482. The court concluded that the ADEA provided the exclusive remedy for claims of age discrimination, whether those claims are founded on the Constitution or on rights created by the ADEA. We agree.

In a similar analysis, the Fourth Circuit in *Zombro v. Baltimore City Police Dept.* noted that "[t]he text and context of the ADEA itself confirm this conclusion [that ADEA is exclusive remedy]: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures, provided in sections 211(b), 216 ...' 29 U.S.C. § 626(b). Section 216 is a part of the Fair Labor Standard Act (FLSA) ..., and it has been held that the statutory remedy of that section is the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA." 868 F.2d at 1369 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F.Supp 1027 (N.D.Cal. 1972)). The court concluded that the provisions of the ADEA evidence congressional intent to subject all age discrimination claims to the comprehensive statutory scheme clearly embodied in the language and legislative history of the ADEA.

In discussing the procedural requirement of the ADEA, one federal district court stated:

> The inescapable conclusion that is drawn from the foregoing is that if other modes of enforcement were available to the private litigant, the congressional scheme behind ADEA enforcement could easily be thwarted. An impatient plaintiff might unilaterally dispense with the informal negotiations contemplated by Congress, needlessly casting all concerned into costly litigation. Congress did not intend to allow a plaintiff to bypass the statutory scheme clearly embodied in the language of the ADEA. The only reasonable construction of the Act is that the statute's remedy is exclusive.

McCroan v. Bailey, 543 F.Supp. 1201, 1209 (S.D.Ga. 1982). In sum, based on (1) the above cases holding that the ADEA is the exclusive remedy for age discrimination claims, (2) the cases holding that traditional preemption analysis does not apply when two federal statutes conflict, and (3) the inapplicability of extending the federal/state policy considerations guiding traditional preemption analysis to conflicts between federal statutes, we conclude that Congress intended the ADEA to be the exclusive remedy for age discrimination claims. Accordingly, we disagree with the district court's holding that the ADEA is preempted by the NLRA, and conclude that this Court has jurisdiction under the ADEA to entertain the plaintiffs' age discrimination claims.

III. Summary Judgment on Britt's ADEA Claims and Directed Verdict on Hamilton's ADEA Claims.

Having determined that this Court has jurisdiction over the age discrimination claims, we review both the district court's granting of summary judgment in Grocers' favor on Britt's claims and the district court's directing a verdict in Grocers' favor on Hamilton's claims. After reviewing the merits of the claims, we affirm the respective decisions of the district courts.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to

interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). Finally, as the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 256, 106 S.Ct. at 2514 (citations omitted). The Court also held that the standard of review for a directed verdict is the same as that for review of a summary judgment. *Id.* at 250, 106 S.Ct. at 2511.

In addition, a reviewing court is not limited to the district court's reasons in affirming a grant of summary judgment. This Court may affirm on grounds other than those relied upon by the district court when the record contains an adequate and independent basis for that result. *Guthrie v. Tifco Indus.*,941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, — U.S. — , 112 S.Ct. 1267, 117 L.Ed.2d 495 (1992); *Schuster v. Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988).

When no direct evidence of age discrimination exists, the evidentiary procedure generally adapted to the ADEA context is that announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *See Bienkowski v. American Airlines*, 851 F.2d 1503 (5th Cir. 1988). Initially, the plaintiff must prove a *prima facie* case of age discrimination. The elements of a *prima facie* case are hotly

disputed in these two cases.[11] The elements of a *prima facie* case may be somewhat flexible in an ADEA case according to the facts in issue. *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980). Because we affirm the district courts on an alternative basis, it is unnecessary to resolve the issue of what the proper elements of a *prima facie* case should be.

[3] If the plaintiff proves his *prima facie* case, a presumption of discrimination is established. The burden of production then shifts to the defendant to rebut this presumption by articulating a legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff. *Id.* Finally, the plaintiff must prove that the defendant's reasons are pretexts for unlawful discrimination either by showing: (1) that a discriminatory reason more likely motivated the defendant or (2) that the defendant's reason is unworthy of credence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207

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11. The district court in the Britt case held that a *prima facie* case consists of evidence that a plaintiff (1) was discharged, (2) was qualified for the position, (3) was within the protected class at the time of discharge, (4) was replaced by someone outside the protected class, or (5) by someone younger, or (6) show otherwise that his discharge was because of age (citing *Bienkowski*, 851 F.2d at 1505).

The district court in the Hamilton case held that the plaintiffs could establish a *prima facie* case by showing (1) the company refused to consider recall applications of protected employees over forty years of age; (2) applications for recall were accepted from workers under forty years of age; and (3) the protected workers were qualified for the jobs.

Both the plaintiffs and Grocers each articulate a different version of what they believe the correct test for establishing a *prima facie* case should be.

(1981). The plaintiff retains the burden of persuading the fact finder that impermissible discrimination motivated the adverse employment decision. *Id.*

[4] Both Britt and Hamilton contend that Grocer's replacement of employees with others, some of whom were allegedly younger, was motivated by the age of the strikers and violated the ADEA. The district courts in both Britt and Hamilton held that the plaintiffs had failed to make out a *prima facie* case under the act.

As this Court has stated "it is relatively easy both for a plaintiff to establish a *prima facie* case and for a defendant to articulate a legitimate, non-discriminatory reason for his decision." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 811 (5th Cir. 1991). Because neither plaintiff can show that the defendant's reasons for disparate treatment of the plaintiffs are pretexts for unlawful discrimination, however, we see no need to rummage through the arguments over whether the plaintiffs have established a *prima facie* case. In the context of summary judgment or directed verdict, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. Bother Britt and Hamilton fail to do so.

Grocers contends that its decision to convert the temporary employees into permanent employees was motivated by several concerns: (1) its gratitude to these individuals for keeping the company in operation during the strike; (2) that these temporary employees were leaving to take jobs elsewhere; and (3) striker misconduct. In the Britt case, the plaintiffs offered several affidavits in an attempt to establish pretext. The evidence in these affidavits offered to show age-related employment decisions consists of what are at best characterized as stray remarks by three Grocers

employees concerning the age of the workers. This Court has ruled that similar statements are insufficiently probative to create a jury issue in and ADEA case. *Guthrie v. Tifco*, 941 F.2d at 379; *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 565 (5th Cir. 1983); *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984); *Stendebach v. CPC Int'l, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982), *cert. denied*, 461 U.S. 944, 103 S.Ct. 2122, 77 L.Ed.2d 1302 (1983). These statements are insufficient to show either that (1) a discriminatory reason more than likely motivated Grocers or (2) Grocers' explanation is unworthy of credence.

The Hamilton plaintiffs relied on much the same evidence in presenting their case for trial as did the Britt plaintiffs in the summary judgment proceeding. This evidence even considered with the additional evidence adduced at trial is insufficient to rebut Grocers' reasons for failing to recall the strikers. As the district court found, Grocers may have been reluctant to rehire these workers, but the evidence is insufficient to establish that the reason for this reluctance was age discrimination.

Contrary to plaintiffs' assertions, Grocers was under no obligation to notify the plaintiffs that they were being replaced. Nor does this lack of notification imply a bias based on age. Hamilton also challenges Grocers' practice of refusing to recall anyone who resigned to obtain his benefits. The theory is that Grocers coerced older workers into resigning to obtain their pension benefits, thereby discriminating against these workers based on age. Nothing in the record supports this claim. Additionally, we do not see how this practice harms older plaintiffs.

Hamilton asserts that the strikers were replaced because of their seniority and higher salaries, and that such an action supports an inference of age discrimination. This

Court, however, has stated repeatedly that "[s]eniority and age discrimination are unrelated." *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n. 17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *see also Amburgey*. 936 F.2d at 813. Hamilton relies on *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir.), *cert. denied*, 490 U.S. 1098, 109 S.Ct. 2448, 104 L.Ed.2d 1003 (1989), to support this contention. *Uffelman* is distinguishable, however, because, by terminating Uffelman, the employer was able to avoid paying Uffelman's retirement benefits as he was nine months away from vesting. In this case, Grocers actually paid substantial retirement benefits to strikers who resigned. Finally, the comparison of the age of workers at another Grocers' subsidiary with the age of workers at the location where the plaintiffs worked does not bolster this argument.

Hamilton offered as support of age discrimination evidence that during the recall, younger workers were hired to take regular positions, while older employees awaiting recall were offered only jobs in the frozen food warehouse.[12] The record does not support this contention. Additionally, this Court held in *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990), that offering a different job to the plaintiff did not raise a genuine issue of fact regarding pretext. We find the remainder of Hamilton's evidence equally unconvincing.

In sum, the appellants are left with nothing more than their speculation and belief that they were permanently replaced because of age. This type of evidence is insufficient to create a fact issue as to pretext. *Little v. Republic Refining Co.*, 924 F.2d 93 (5th Cir. 1991); *Laurence v.*

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12. Plaintiffs complain that the recall offers were to frozen food selector positions, which they claim are undesirable.

Chevron U.S.A., Inc. 885 F.2d 280 (5th Cir. 1989). Therefore, we uphold the summary judgment in the Britt case and the directed verdict in the Hamilton case.

IV. Summary Judgment of Hamilton's Section 301 Claims.

[5] The Hamilton plaintiffs base their § 301 claims on alleged agreements made between the union and Grocers in April of 1987. They contend that about April 2, 1987, Mr Ed Fox, Grocers' operations manager, offered to permit the return of the striking employees, if they immediately agreed to cease their strike. They further contend that this offer and acceptance constituted an employment contract between the company and the union, the breach of which is actionable under Section 301 of the LMRA, 29 U.S.C. § 185(a). Hamilton also asserts that a letter from Mr. R.S. Bambace to Mr. A. W. Parker agreeing to recall strikers as provided by *Laidlaw Corporation v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100 (1970), also constituted an offer which was breached. The district court held that neither the oral agreement nor the letter constituted a contract for labor giving rise to a § 301 action, and granted Grocers' Motion for Summary Judgment. We affirm.

Under the L.M.R.A. § 301, 29 U.S.C. 185, a federal court has jurisdiction over breach-of-contract actions between an employer and a labor organization. The fact that an alleged contract was based on an oral agreement during negotiations does not make it unenforceable under §185. *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 920 (5th Cir. 1983).

The evidence presented by Hamilton in support of the contract demonstrates that this promise was never considered a binding contract arrangement. A.E. Parker, the union negotiator to whom the alleged statements were made, did not regard the statement as an offer of a binding contract, nor does he show that the Union accepted such an offer. In fact, the strikers agreed to return to work unconditionally after the supposed agreement was made. The district court correctly dismissed the § 301 claim, because no evidence existed from which a jury could find that a contract existed between the strikers and the company.

[6] Hamilton's argument that the company breached the written recall agreement must also fail. This claim is barred by Hamilton's failure to pursue the appropriate arbitration remedies. Where a contract provides for binding arbitration, an employee may not sue his employer under § 301 unless he has exhausted those remedies. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985). Hamilton does not dispute the existence of the arbitration provision or the failure to invoke it. Hamilton instead argues that, because Grocers repudiated the remedial procedures specified in the contract, *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518, 519 (5th Cir. 1978), requires that there was no need to exhaust the arbitration rights. We disagree. Grocers alleged misconduct is insufficient to invoke the repudiation exception.[13] We affirm the holding of the district court.

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13. Hamilton argues that Grocers repudiated the arbitration procedures by concealing its alleged breach of the recall agreement through its use of labor pool workers.

V. Summary Judgment on Hamilton's State Law Tort Claims.

[7-10] Hamilton alleges a cause of action for the state law torts of duress and intentional infliction of emotional distress. The district court held that these claims are preempted by provisions of the NLRA and the ADEA based on *Farmer v. United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), and granted Grocers' Motion for Summary Judgment. We do not agree that Hamilton's claims are preempted under *Farmer*. However, we affirm the district court's holding. Hamilton's allegations of intentional infliction of emotional distress and duress are meritless. Grocers merely insisted on its legal rights in a permissible way. Under this Court's decision in *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991), that does not give rise to a cause of action. The decision of the district court is affirmed.

In sum, for the foregoing reasons, we disagree with the district court's holding in the Britt case that the NLRA preempts the ADEA. Because we agree with the district court's holdings on all other issues, the judgments are

AFFIRMED.

SUPPLEMENTAL
APPENDIX C

Richard L. BRITT and Timothy Jackson, Jr., et al., Plaintiffs,

v.

GROCERS SUPPLY COMPANY, INC. et al., Defendants.

Civ. A. N. H-88-1281

United States District Court, S.D. Texas

April 8, 1991.

Employees who struck based on employer's proposal to change wage calculation from flat rate system to one based on productivity and who were replaced by allegedly younger workers brought age discrimination action. The District Court, Hughes, J., held that: (1) workers failed to state claim under Age Discrimination in Employment Act, and (2) even assuming that change in compensation was motivated by hostility to older workers, claim would be preempted by National Labor Relations Act.

So ordered.

1. Civil Rights 168

Workers who struck and were replaced failed to state claim under Age Discrimination in Employment Act, inasmuch as workers were not discharged, workers presented no evidence that they were within protected class and

workers offered no evidence that they were replaced by younger employees, and even if employer's new payment scheme calculating wages on productivity rather than on flat rate system favored younger workers because it required harder work it did not violate Act to require all workers to increase output. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Civil Rights 388

To make prima facie case under Age Discrimination in Employment Act, plaintiffs must show that they were: (1) discharged; (2) qualified for their positions; (3) within protected class at time of discharge; and (4) replaced by younger workers or otherwise discharged because of their age. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

3. Civil Rights 332

Even assuming that employer's proposed change in wage calculation from flat rate system to one based on productivity was motivated by hostility to older workers, age discrimination claim brought by workers who struck and were replaced by allegedly younger workers was preempted by National Labor Relations Act because issue was one within conditions of employment that union and management had authority to negotiate. National Labor Relations Act, §1 et seq., as amended, 29 U.S.C.A. §151 et seq.

Richard Britt, pro se.

James M. Mabry, Houston, Tex., for Jackson.

Christopher E. Howe. Houston, Tex., for defendant Grocers Supply.

Eric H. Nelson, Houston, Tex., for defendant Teamsters.

OPINION ON SUMMARY JUDGMENT

HUGHES, District Judge.

1. Introduction.

Richard L. Britt and Timothy Jackson, Jr., brought this class action against Grocers Supply Company, Inc., and the Teamsters Local 968 alleging that the employer's change in the wage calculations from a flat rate system to one based on productivity was age discrimination. The plaintiffs have abandoned their claims against the Union, and they consented to the entry of an adverse judgment to their deceptive trade practices claims against Grocers Supply. The court finds the evidence insufficient to establish that the employer's change to a new system of calculating wages was discriminatory. The plaintiffs were not discharged; they walked off the job. Finally, the plaintiffs' age claim is preempted by the National Labor Relations Act. This action will be denied.

2. Background.

The plaintiffs were employed as drivers and warehousemen at Grocers Supply. During negotiations with the Union in the fall of 1986, Grocers Supply proposed employee compensation based on productivity rather than an hourly wage. The work force consisted mainly of long-term employees over forty years of age. The workers opposed the new production system. Against the advice of the Union leadership, the workers voted to strike on December 21, 1986.

During the strike, Grocers Supply hired replacements for the strikers. In early 1987, Grocers Supply began converting these temporary workers into permanent employees. The strikers stopped picketing and attempted to return to work on April 6, 1987. The strike was an abject failure. When the plaintiffs asked to return to work, Grocers Supply told them that they had been replaced but they would be considered first for openings.

3. Age Discrimination

[1,2] The plaintiffs contend that Grocer Supply's replacement of employees, some of whom were allegedly younger, was motivated by the age of the strikers and violated federal law. *Age Discrimination in Employment Act*, 29 U.S.C. §621. To make a prima facie case under the act, the plaintiffs must show that they were: (a) discharged; (b) qualified for their positions; (c) within the protected class at the time of discharge; and (d) replaced by younger employees or otherwise have been discharged because of their age. *Bienkowski v. American Airlines*, 851 F.2d 1503 (5th Cir. 1988).

A. Discharge.

The plaintiffs were not discharged. They voluntarily walked off the job because of an unfavorable impasse in the negotiations for a new union contract. Once the strike ended, the plaintiffs attempted to return to their positions but found that other people held the jobs they had left. Grocers Supply did not bar the strikers from later employment; it agreed that they would be reemployed as soon as jobs became available.

B. Qualifications.

The court assumes the plaintiffs are qualified because they would have returned to their previous positions, although under a new management scheme.

C. Protected Class.

After years of litigation, the plaintiffs have presented no evidence of the class members' ages or that all of them were over forty.

D. Replacements.

Finally, the plaintiffs have offered no evidence that they were replaced by younger employees. Nor is there evidence that the applicant pool for replacement drivers was older than the average person hired from that pool during the strike. There is no evidence that Grocers Supply was hostile to older workers or otherwise considered age rather than ability.

The only articulable basis of age discrimination offered was the perception of one of the original workers that the new scheme favored younger workers because it was going to require harder work. Assuming that to be true, it does not violate the act to require all workers to increase output, hours, or other burdens.

4. Preemption.

[3] Even assuming that the change in compensation and scheduling was motivated by hostility to older workers, the national labor relations laws would preempt a claim under the age discrimination act since the issue is one within the conditions of employment that the union and management have authority to negotiate. Indeed, they were negotiating the work assignments. In the event of a conflict, if a non-NLRA claim applies to the same conduct that otherwise would be an NLRA issue, the NLRA preempts the others. *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180, 194, 98 S.Ct. 1745, 1754, 56 L.Ed.2d 209 (1978).

In an absolute conflict, the rights of people as individuals transcend those of people as employees. The NLRA, however, does not even risk undermining the age discrimination act in this instance. *Sears, Roebuck & Co.*, 436 U.S. at 187, 98 S.Ct. at 1752. This case is not one of an individual discriminated against because of age due to the culture of the employer; this is a dispute over ordinary working conditions of a group of workers who happen to be over forty. It is possible for a union and employer to collude to benefit younger workers at the direct expense of protected workers in a way that bears little relation to a significant interest of either union or employer. The plaintiffs, however, offered no evidence of that circumstance even though the court encouraged them to develop that evidence, if it existed. The plaintiffs' age allegations are identical to those that would be made under an unfair labor practices complaint. NLRA §§ 8(a)(1), (3), and (5).

5. Conclusion.

The plaintiffs have failed to proffer evidence of the elements under the federal age discrimination statute, and if they had established that claim, it would be preempted by the national labor laws. The plaintiffs will take nothing from Grocers Supply.

Supreme Court, U.S.
FILED
APR 29 1993
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No. 92-1577

In The

Supreme Court of the United States

October Term, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. et al.,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

THE GROCERS SUPPLY COMPANY'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the ADEA plaintiffs' evidence was sufficient to avoid summary judgment.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Grocers Supply Company was the Defendant-Appellee in the court of appeals.

The Plaintiffs-Appellants in Case No. 91-2493 were Mae Alice Britt (substituted as a party for Richard L. Britt, deceased), Timothy Jackson, Jr. and 126 additional individuals who opted in pursuant to 29 U.S.C. §216(b). Their names are listed below.[1]

---

[1] Aaron Ben, Willis Ben, Glendon Felix Bertrant, Carl Boyd, Lenzie Burke Sr., Sylvester Burley, Leslie Campbell, Major Campbell, Willie Chatman, Sam Clark, L.C. Clayton, Samuel Clinton, Richard Coleman, Alvin Coney, Elijah Coruthers, Bruce Craft, Glen H. Craft, James E. Darby, Bill Davis, Jessie C. Davis, Charles Dease, Willie Deason, Jesse Doggett, Joe Douglas, William Drewy, Walter Ealcy, Donald Edwards, Edward Espree, Melvyn Finkelstein, Nelson Frank, James A. Garner, Arturo N. Garza, Marshall George, Herbert Gladney, Elbert L. Gooden, Ernest Grant, Allen Green, Costell Green, Dalfred Greene, Judge Greene, Lonnie Greene, Tom Greene, Wilfred Greene, James Greer, Vernon Gross, Larry J. Guillory, Edward Gums, Jr., Elbert E. Hailey, Turner Hall, Alfred Hamilton, Alfred Hamilton, Robert Hargrove, Leonard Harris, Willie Harris Jr., Joseph Henry, Edward Hernandez, James Hightower, James Hill, Carl Edward Hinton, Gilbert Hogan, Clarence Holloway Sr., Raymond Hooks, Eugene Hunter, W.L. Hunter, Sr., Clarence Ivory, Earnest L. Jackson, Emmerson Jackson, James Jackson, Leland Jackson, Leveari Jackson, Lorenzo Jackson, Richard Jackson, Talton Jacobs, Wheeler Johnson, Craig Jones, Floyd Jones, Marvin Jones, Roy Jones, Cardis L. King, Hillary Ladet, Curtis Landry, A.G. Lane Jr., Robert Latin, George Lee, Jerry Mack, Felix Martin, Aubrey McAfee Jr., Dan Meekins Sr., Clay Menifee, Jerome D. Minor, Robert Mosley, Harold E. Neal, Alvin Patterson, George Patterson, Freelon Payton, Bobby Pittman, Willie Readus, Curtis Richardson, Edward Rideout, Jerry Roach,

PARTIES TO THE PROCEEDING IN THE COURT BELOW – Continued

Additionally, in the court below this case was consolidated with Case No. 91-6043, styled *James E. Hamilton, et al. v. The Grocers Supply Company.*

R.L. Robins, Rollie Rogers, Milton Royer, Harvey Rusher, Harvey Rusher, Robert Sanders, James Scott, Murray Scott, Wilson Scott, Archie Searcy, Gary Don Seastrunk, James Simmons, LeRoy Smith, Manfred Spencer, James Thomas, Lloyd Tolivar, Kirby Veazie, Howard Washington, Robert Webster, K.T. Wheatfall, Alfred Whittington, Earnest Williams, Eldrid Williams, Thomas Williams, William Barlow Wright, Clarence Young, and Russell Young.

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Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) 3

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Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et. seq.* ..... *passim*

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Supreme Court Rule 10 4

No. 92-1577

In The

Supreme Court of the United States

October Term, 1992

RICHARD L. BRITT AND TIMOTHY JACKSON, JR. et al.,

Petitioners,

v.

THE GROCERS SUPPLY COMPANY,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

THE GROCERS SUPPLY COMPANY'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an age discrimination case brought by a group of strikers who were denied reinstatement to their jobs at the end of their strike. The district court granted summary judgment for Grocers on two grounds: (1) the ADEA claims were preempted by the National Labor Relations Act; and (2) the lack of evidence presenting a

triable issue of fact concerning age discrimination. The Fifth Circuit affirmed on the latter ground.

REASONS FOR DENYING THE WRIT

There is No Conflict Among The Circuits on The Probative Value of Age-Related Comments in an ADEA Case.

The Fifth Circuit's decision below is fully consistent with other decisions not only from that circuit but also from other circuits.

Contrary to Britt's argument, a federal court is not compelled to grant a jury trial to every ADEA plaintiff who can produce an affidavit alleging an age-based comment. The Fifth Circuit has frequently approved summary judgment or judgment notwithstanding the verdict for ADEA employers despite the presence of such evidence. *See, e.g., Davis v. First National Bank of Killeen*, 976 F.2d 944, 950 (5th Cir. 1992), (plaintiff's jury verdict reversed despite evidence of repeated references to "old" employees); *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991), *cert. denied* ___U.S.___, 117 L.Ed.2d 495 (1992) (summary judgment affirmed despite comment that young new president should surround himself with people "his age"); *Neely v. Delta Brick and Tile Co.*, 817 F.2d 1224 (5th Cir. 1987) (*per curiam*) (comment that company "was bringing in new people and younger people" held insufficient to overturn j.n.o.v. for employer); *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 565 (5th Cir. 1983), *cert. denied* 467 U.S. 1215 (1984) (plaintiff's jury verdict overturned despite company president's statement that he wanted "new blood" and new "lean and

mean" marketing team); *Stendebach v. CPC Int'l, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982), *cert. denied* 461 U.S. 944 (1983) (statement that age might be relevant factor in reduction-in-force case held insufficient to create a jury issue); *Simmons v. McGuffey Nursing Home*, 619 F.2d 369, 371 (5th Cir. 1980) (summary judgment for employer affirmed despite evidence that board member had stated "we want a younger man").

Other circuits have done likewise, including two of the supposedly "conflicting" circuits cited in Britt's petition. *White v. Westinghouse Elec. Co.*, 862 F.2d 56 (3d Cir. 1988) (age comments insufficient to establish pretext); *Palmer v. United States*, 794 F.2d 534 (9th Cir. 1986) (summary judgment affirmed despite comments that employees were "getting too old"); *Parker v. Federal National Mortgage Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984) (summary judgment affirmed despite "preference for youth" comment); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980) (j.n.o.v. for employer affirmed despite comment that "division's future lay in its young Ph.D.'s").

Like any other evidence, age-based comments can occur in a wide variety of circumstances. The probative value of such comments may range from nil to highly incriminating, depending entirely on the context. For example: Was the statement made by a decision-maker? Did it refer to the plaintiff? Was the speaker joking or serious? Did it concern the employment decision at issue? Was it made before or after the employment decision? Was it an isolated statement, or repeated many times? Is the comment capable of an innocent construction? Is there any other evidence of age bias? All these questions,

and more besides, must be answered before an assessment of probative value can be made. The inquiry is intrinsically factual in nature.

The Supreme Court has already provided sufficient guidance to federal courts on how to evaluate statements which might reflect unlawful bias in job discrimination cases:

> [S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in that regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring.)

The record in this case reveals that all but one of the age comments relied upon by the Britt plaintiffs were made by non-decisionmakers, i.e., persons who were not involved in the decision whether to reinstate the strikers. The "new car/old car" comment attributed to Mr. Levit, who was a decisionmaker, was age neutral, because it simply compared the post-strike workforce with the pre-strike workforce, and did not refer to the chronological age of any employee. Therefore, the Fifth Circuit correctly held such comments were insufficient to create a jury issue.

Britt's petition does not raise any legal issue significant enough to warrant review by this Court under the standards set by Supreme Court Rule 10. The focus of the

Britt petition is a routine sufficiency of evidence question, which is inherently fact-specific. The Fifth Circuit has carefully reviewed the extensive record in this case and applied the correct legal standard in evaluating the plaintiffs' evidence. There is no need for this Court to repeat the exercise.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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